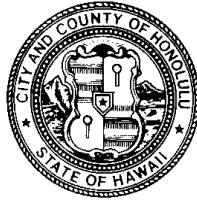


ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL  
MAYOR



CHARLES W. TOTTO  
EXECUTIVE DIRECTOR &  
LEGAL COUNSEL

ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

Date and Place: May 30, 2014  
Standard Financial Plaza  
Conference Room, Suite 211

Present: Charles W. Gall, Esq., Chairperson [For All Items Except IV.A.3]  
Katy Chen, Esq., Vice Chair (Arrived 12:30 p.m.)  
Michael A. Lilly, Esq., Commissioner  
Stephen Silva, Commissioner  
Stanford Yuen, P.E., Commissioner  
Charles W. Totto, Executive Director and Legal Counsel (EDLC)  
Laurie A. Wong, Associate Legal Counsel (ALC)  
Letha A. S. DeCaires, EC Investigator  
Geoffrey Kam, Deputy Corporation Counsel, COR

Absent: Rachael S. Wong, Dr.PH, Commissioner  
Jeffrey Burroughs, Ph.D., Commissioner

Stenographer: Lisa P. Parker, Legal Clerk

**I. CALL TO ORDER**

The 480<sup>th</sup> meeting of the Ethics Commission ("Commission" or "EC") was called to order at approximately 11:40 am by Chair Gall.

The Commission had before it the memorandum regarding the Agenda Items for the May 30, 2014 Meeting, Open Session, dated May 23, 2014.

**II. FOR ACTION: REQUEST FOR A MOTION TO APPROVE THE MINUTES OF THE OPEN SESSION OF THE MARCH 17, 2014 and APRIL 25, 2014 MEETING**

A motion to approve and adopt the minutes of the open sessions of the March 17 and April 25, 2014 Meetings was made by Commissioner Yuen. The motion was seconded by Commissioner Silva and unanimously approved.

### **III. OLD BUSINESS**

The following meetings of the EC were confirmed for Thursday, June 26, 2014 at 11:30 am and Wednesday, July 23, 2014 at 11:30 a.m.

The Commissioners discussed further dates for meetings and confirmed availability for a specific meeting for those Commissioners to hear motions for the contested case on Tuesday, June 10, 2014 at 11:30 am. Commissioner Lilly asked about the media coverage of this case. EDLC recommended that the Commission discuss this in Executive session. This discussion was deferred until Vice Chair Chen was present.

The Commissioners decided to hear motions for the contested case on Tuesday, June 10, 2014 at 11:30 am.

### **IV. NEW BUSINESS**

#### **A. Administrative News**

The EDLC referred to his memorandum to the Commission regarding Open Session items dated May 23, 2014 in regard to the Commission's statistics (sections 1 and 2 on the agenda) stated that there was nothing remarkable to note in this month's complaints and requests for advice statistics.

#### **3. Fiscal Year 2014 Budget Expenditures.**

The EDLC stated that the deadline to expend FY 2014 funds is approaching quickly, the end of June. Staff has had several issues in trying to timely use FY 2014 funds before the end of the year.

The EDLC stated that the first issue was in regard to purchasing a \$600 GPS device for an investigation regarding an alleged overtime fraud scam. Commissioner Lilly noted that investigations of this nature have very short "windows" of opportunity for surveillance. The EDLC stated that in order to determine where the subjects are going in city trucks, staff wanted to attach the GPS device to City vehicle(s). Staff has a COR legal opinion from a few years ago for approval to use a GPS device with the recommendation to obtain the consent of the Department in question. In this case, staff received approval from Director of the Department in which the subjects work. Staff tried to purchase the GPS system through COR. This request went unanswered for three weeks and when questioned, COR stated that the request was "under review." COR later told staff that there were "policy implications" related to our purchase. The EDLC explained that he asked Managing Director Ember Shinn for assistance in this matter and Ms. Shinn requested that Corporation Counsel, Donna Leong, and/or First Deputy, Sheryl Nicholson, resolve this issue with us. But so far there still has been no response. Because of this delay, this investigation has now been compromised.

The second item at issue is trying to obtain funding to contract with investigators to help staff with surveillance such as in the previously described case and other excess investigative work including the ORI investigation. Staff has made the request for the contract to COR, but no one has responded to staff. After COR approves the contract, it still needs to be routed through the Department of Human Resources, Budget and Fiscal Services and then to the City Council because we are asking to shift \$28,000 from one account to another. All of this must happen by the end of June in order for us not to lose our FY 2014 funds. At this time it looks as if this will not be feasible because of the time constraints to complete.

The third item is in regard to the already approved Legal Clerk I position. Staff requested COR to provide us with any current position description to be used as a template to create our new job description. COR responded that they do not have one to give us because they do not use any Legal Clerk I positions. No other solutions or help have been offered. The filling of this position is critical and it takes significant time to not only create the job description for approval, but also go through the process of posting, applications, interviews and hiring.

Commissioner Lilly asked why staff is going through COR instead of directly to the Department of Human Resources (DHR) since COR is only supposed to be our conduit for administrative purposes. The EDLC explained that he has not gone directly to the DHR for assistance because it was his understanding that we have to go through the chain of command which starts with COR. Also, the EDLC explained that in regard to this Administration, he has been told that all questions for DHR from the Commission must go to the DHR Director. The EDLC stated that this is a simple request that the COR Administrative Services Officer (ASO) should be able to provide assistance, because it is part of typical administrative duties of any ASO. The EDLC further stated that the Legal Clerk I comprises 20% of the Commission staff and we need to get the position description ready by July 1st.

The final issue was that we need to use FY 2014 funds for a build out of the current office to accommodate the additional employee. The EDLC explained that there has been talk that all City Commissions will be moved to the Sprint Building. The earliest the office would move to the new location, due to required renovation, is in December. When we get our new position filled, we will not have any room to accommodate the staff unless there is a build out. COR is not responding to our requests for help in this matter either.

Commissioner Lilly stated that he is concerned that there is a recurring spectrum of either benign neglect or intentional harm from COR occurring for administrative and investigative functions of the Commission. Vice Chair Chen stated that she remembered that in at least one previous case, COR's failure to respond in a timely manner compromised EC's investigations. The Vice Chair believes that the EC's efforts should be supported by COR administratively--not hindered or frustrated by lack of response in a timely manner.

Commissioner Silva asked how much money was lost by not having the GPS in time? Investigator DeCaires responded possibly a quarter of a million dollars.

Chair Gall asked if the Commission could pass a resolution. The EDLC responded that it

could, as it did in the past when a resolution was required to initiate certain aspects of an investigation.

Chair Gall stated that in regard to language for a resolution, he is more comfortable with the terms, “a lack of responsiveness” as opposed to “benign neglect.” Chair Gall asked Deputy Corporation Counsel Geoff Kam if he had insight on how the Commission could resolve this.

Deputy Kam stated that since the conflict between the Commission and COR has been made public last fall, he has not been involved with these types of budget issues. Deputy Kam stated that he didn’t believe that passing a resolution was necessary and instead suggested the Commission write a letter to Ms. Leong because a discussion at that level is warranted at this point. Commissioner Silva added that the Mayor needs to be copied on the letter.

The EDLC stated that he believed that the letter should be addressed to the Managing Director with a copy to Ms. Leong because the Managing Director will direct others to respond to this issue. The EDLC asked that the Commission authorize him to write the letter which will reflect the position of the Commission.

Deputy Kam advised that the Commission should sign the letter as opposed to the EDLC, since it is reflecting the views of the Commission. Commissioner Yuen stated that since the requests from staff have not yielded results, perhaps it would be better to have the letter signed by the Commission.

Chair Gall stated that he was comfortable with the EDLC drafting and signing the letter. Chair Gall instructed the EDLC to send the draft letter to Commissioner Lilly, since it was his Motion, and to also send it to the Chair so there can be final approval and signature. The EDLC stated that he did not anticipate the Commission’s action in this manner and asked to move into Executive Session.

Deputy Kam asked the EDLC what the grounds were for moving to Executive Session. The EDLC stated the Commission staff needed to provide advice to a member because of a potential conflict of interest issue.

**Commissioner Yuen moved to enter into Executive Session. Commissioner Michael Lilly seconded the Motion. The Motion passed unanimously.**

After discussion, Chair Gall recused himself in regard to this agenda item. The **EDLC added that Chair Gall’s recusal at this point means that there is no quorum to hear this matter since Vice Chair Chen was not present.** Further discussion involved whether the Commission would defer the matter to the next meeting or to when Vice Chair Chen arrived at the present meeting.

Chair Gall requested to continue with the Executive Session agenda items.

**[Vice Chair Chen Entered the Meeting at 12:30 p.m.]**

The EDLC summarized the earlier discussion for Vice Chair Chen. Vice Chair Chen asked if we know for certain that the investigation has been compromised. The EDLC and Investigator DeCaires responded, “yes”.

Commissioner Lilly stated that he had made a motion earlier in the meeting for the Commission to transmit a letter that we see a pattern of lack of support by the administration for what we do as an independent agency. We are being repeatedly hamstrung by the bureaucracy and we want this to come to an end. Vice Chair Chen said that this is also at the expense of the public. Commissioner Lilly stated the EC’s mission is being thwarted by the bureaucracy. The EDLC stated that Commissioner Lilly had used the term “benign neglect”, whereas Chair Gall suggested the terms “lack of timely response” to be included in the letter.

Vice Chair Chen questioned Chair Gall’s recusal in this matter. The EDLC explained that Chair Gall disclosed today that he and his firm does work for COR so that his involvement in a vote such as this would be inappropriate.

Some of the other language proposed in the letter could be that the agency that we are attached to should support, not frustrate our purposes. Vice Chair Chen stated that she believed it should be emphasized that this is a pattern of behavior and these recent incidents are not isolated. Commissioner Silva stated that he wanted to include the dollar amount that the taxpayers have lost as a result of the delay in our equipment. Commissioner Lilly stated that for the want of a \$600 piece of equipment, they compromised an investigation that could have identified fraud, waste and abuse of a quarter of a million dollars was thwarted. Vice Chair Chen stated she is also very troubled with the Managing Director’s previous statement at the Commission’s Fall 2013 meeting that the Commission’s investigations don’t really save the city money from fraud, waste and abuse because it just leads to cases being grieved by employees.

The EDLC stated that what he took from the Managing Director’s comment was that the potential for bureaucratic problems to arise outweighed the benefit of conducting investigations to identify and eliminate fraud, waste and abuse. The EDLC stated that since this is the tone from administration, we shouldn’t be surprised about our treatment from lower tiers of government. Vice Chair Chen agreed that the Commission send the letter to the Mayor.

The EDLC stated that this is another reason why the EC publishes formal advisory opinions and forewarns employees what could happen when they do certain actions. The coconut wireless in the City works well and quickly, and when an employee is “dinged,” the people throughout the whole system are more careful with their own actions. He stated that the EC needs to draft a non-incendiary letter to help us clearly identify these on-going problems but leave room for solutions.

Commissioner Lilly stated that the letter should come from the Commission with the Vice Chair’s signature. The Commission needs to address again what happened last Fall that we

believed had been resolved. He reiterated that the EC is only attached to COR for administrative purposes. COR has no oversight regarding our budget and policy. COR has no business raising a policy issue with respect to our independent functions. COR is using their administrative authority to basically supervise the Commission. We need to be independent because we might have to investigate COR from time to time. To question the EC's purchasing of a GPS device to investigate misuse of a city resource as a policy issue, COR questions if we have the authority to make this purchase. COR could stop anything we do with that same policy argument.

The EDLC stated that what the EC does is on the cutting edge of making people accountable in government which creates a lot of resistance. Commissioner Lilly stated that we need to get something out in a timely manner.

Vice Chair Chen stated that she understands the need for being non-incendiary and that the letter should include a discussion of the values permeating downward from city management, which is why we are addressing the letter to the Mayor.

The EDLC stated that Corporation Counsel, Donna Leong, never withdrew her comment that she has line item veto on our budget. We have tried to resolve this issue for months. A draft letter incorporating the EC's discussion will be created and sent to both Commissioner Lilly and to Vice Chair Chen for review and approval.

Commissioner Yuen asked who would be copied on the letter. The EDLC stated that it should include the Managing Director Shinn and Corporation Counsel Leong.

Deputy Kam stated that he had a sunshine law comment. Deputy Kam said that he did not interpret this agenda item "Fiscal Year 2014 budget expenditures," to turn into a broader policy fight between COR and the Ethics Commission albeit arising out of certain budget expenditures. Deputy Kam stated that there is a concern about how the item is framed here especially if it turns into an action, which it has become. Deputy Kam suggested that the Commission generate the letter as a result of an open session discussion for action, and issuance at the next meeting.

Deputy Kam further clarified that the sunshine law gives notice about what the item entails. The way the agenda item is described does not give COR notice. This is especially true because the agenda item "for discussion" has now turned into a motion to issue a letter to the Mayor.

The EDLC stated that his understanding of the sunshine law is that two things need to occur when there is an action that will occur that has not been previously listed on the agenda: 1) that it not affect the rights of the parties that are discussed; and 2) there has to be, in our case, a four vote to amend the agenda to add this motion to it. The EDLC stated that he does not believe that we are looking at individual rights because we are looking at the interaction between two agencies. Therefore, maybe it would be appropriate for the Commission to amend the agenda to include this for action.

Deputy Kam stated that he is willing to go along with the EDLC's suggestion, but wanted it noted in the minutes that he took issue with the way this item was described in the agenda. The EDLC stated that he appreciated the discussion. Deputy Kam agreed with the Commission amending the agenda to include an action item that would send a letter along the lines discussed.

Deputy Kam stated that this item should be put on the agenda next time to see what further discussion occurs at the next meeting.

**Vice Chair Chen asked for a motion to amend the agenda in section IV. A. 3 to state: "For Action: Motion to Draft and Send a Letter to the Mayor to Address the Budget Concerns Along the Lines Discussed." Commissioner Lilly made a motion to that effect. Commissioner Silva seconded the motion. The motion passed unanimously.**

**Vice Chair Chen stated that now that the agenda has been amended, she called for another motion to draft a letter to Mayor Caldwell regarding the budget and policy decisions of the Ethics Commission and its relationship with Corporation Counsel. Commissioner Lilly made a motion to that effect. Commissioner Silva seconded the motion. The motion passed unanimously.**

The EDLC stated that he wanted to discuss one further item regarding the contested case hearing, but was concerned that when Commissioner Yuen recuses himself there will not be enough votes for a quorum. Deputy Kam stated it would be allowed for the purpose to answer the question raised earlier in the meeting.

#### 4. Facebook.

ALC Wong stated that there continues to be positive feedback from our Facebook viewers. We have received more than 130 "likes" or "followers" in just the week we had our "soft opening" and we believe it is driving more people to our Website. Vice Chair Chen, and Commissioners Lilly, Wong and Yuen's photos and bios have been posted. She encouraged the remaining commissioners to provide photos and bios to be published on the website.

#### 5. Examples of Ethics Commission change and growth over the last year.

The EDLC wanted to remind the staff and Commission of the successes over the past year. The EDLC expressed staff's appreciation of the Commission's support and help finding workable solutions with COR. Over the past year the Commission:

- o Handled a record number of thorough and timely investigated complaints which resulted in issuing Notices of Alleged Violation or referral back to the departments for corrective action.
- o Increased staff's ability to work directly with the Administrative Services Officers in other departments.

- o Conducted our first significant contested hearing case under our revised EC rules of procedure which ensured due process for anyone who is alleged to be a subject of an ethics violation.
- o Initiated a large number of investigations of alleged preferential treatment in the complex area of procurement.
- o Is near completion (90%) of all 8,500 city officers and employees for training.
- o Developed regular working relations and cooperation with the FBI, Prosecuting Attorney's Office, State Ethics Commission and Campaign Spending Commission.

The EDLC stated that from his point of view, doing any one of the referenced successes in a year is a substantial feat. He reiterated his appreciation of the Commission's support.

Commissioner Lilly stated he is impressed by the quality, professionalism, and thoroughness of the staff. He stated that his firm partner (Ms. Ng) was an Ethics Commissioner when they first hired the EDLC and all she stated about bringing the EDLC aboard has proved true and the EC is fortunate to have the EDLC.

The EDLC stated that the ALC is an excellent attorney, Investigator Letha DeCaires is an uncanny investigator, and Legal Clerk Lisa Parker pulls us altogether. He further stated that the staff has been lucky to work with Deputy Geoff Kam. Staff would have liked to have permanently hired any of the previous 3 or 4 Po'okela interns if we could as well, but the EC doesn't have any allocated positions or space.

Chair Gall stated that the last item on the agenda has to do with interaction between the Commission and with COR and since he has recused himself, he turned the meeting over to Vice Chair Chen and left the room.

**Commissioner Silva moved to enter into executive session. Commissioner Lilly seconded the motion. The motion passed unanimously.**

Commissioner Yuen recused himself at 1:23 pm.

## **V. EXECUTIVE SESSION SUMMARY**

- A. For Action: Request for a Motion to Approve the April 25, 2014 Executive Session Minutes.

**Chair Gall asked for a motion to approve the April 25, 2014 Executive Session Minutes. Commissioner Lilly so moved. Commissioner Silva seconded the Motion. The Motion passed unanimously.**



- B. For Action: Request for a Motion to Approve and Adopt an Addendum to the Hearing Officer's Report Regarding the Alleged Violations of RCH Sec. 11-104 Misuse of City position, by a Former City Officer.

Counsel for Complainant and Respondent had been notified that the Commission would take up this matter. Counsel for Respondent did not attend the meeting.

Chair Gall reminded the Commission that, at the March meeting, the Commission adopted the hearing officer's findings of facts and conclusions of law but the EC wanted to add: (1) that the appropriate agency needs to provide proper training to avoid this same type of problem occurring in the future; and (2) the standard of review that was referenced in the opinion is not the actual standard that the EC uses to determine an ethics violation. The Commission agreed to add language to the opinion to clarify that the standard was not one of good faith, but whether the party knew or should have known their conduct was a violation. Chair Gall stated that he was charged with working on that, and that he worked on it jointly with Deputy Kam.

Deputy Kam distributed a copy of the draft Advisory Opinion to Complainants (EDLC and ALC). Chair Gall asked the EDLC if he had any concerns about receiving the draft prior to the subject's attorney's review. The EDLC stated that he did not have that issue because the subject's attorney had been informed of the meeting and that this case had been listed on the agenda.

The ALC asked for a short recess so that Complainant could review the Advisory Opinion. Chair Gall called the meeting to recess at 12:09 pm. The meeting was reinstated at 12:16 pm.

The ALC stated that she had two non-substantive requests.

**Chair Gall asked for a Motion to approve the advisory opinion incorporating ALC's requests and directing that Deputy Kam shall redact the Advisory Opinion before publication and issued in the normal course. Commissioner Lilly so moved. Commissioner Silva seconded the Motion. The Motion passed unanimously.**

- C. For Action: Request for a Motion to Approve and Adopt Advisory Opinion No. 2014-03 Regarding Alleged Violations of RCH Sec. 11-102.1(e) and ROH Sec. 3-8.2(c) (Appearing Before a City Agency on Behalf of a Private Interest) by a City Employee.

Chair Gall provided a brief summary of the case.

**Commissioner Lilly moved to approve and adopt the Advisory Opinion as drafted. Commissioner Silva seconded the Motion. The Motion passed unanimously.**

Chair Gall stated that he would sign the advisory opinion before he leaves if it is available.

D. Request for a Motion to Find Probable Cause of a Violation of RCH Sec. 11-104 (Misuse of City Resources for Personal Benefit) by a City Employee.

The ALC provided a short background on this case. The EDLC stated that, previously, an almost identical complaint was received and investigated by the EC by EC attorney, Matt Viola, on the same parties. A letter was sent to the Department at that time, giving them recommendations to avoid further ethics complaints and violations. Apparently, the Department did little to prevent this situation from recurring. Therefore, staff would like to be clearer with the Department in an official advisory opinion.

After discussion, **Commissioner Yuen made a motion to find probable cause and to issue a revised Notice consistent with the recommendations made during the discussion. Vice Chair Chen seconded the motion. The motion was unanimously approved.**

**Commissioner Lilly moved to return to Open Session. Commissioner Yuen seconded the motion. The motion passed unanimously.**

**V. EXECUTIVE SESSION**

Commissioner Lilly asked about media recognition of a case. The EDLC responded that he has been very careful not to disclose any confidential information to the media to protect the individual's privacy interests.

**Commissioner Lilly moved to exit executive session, return to open session, and adjourn the meeting. Commissioner Silva seconded the motion. The motion was passed unanimously.**

**VI. ADJOURNMENT**

The meeting was adjourned at approximately 1:27 pm.